

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 11 of 1985

Hon'ble MR.JUSTICE S.D.DAVE

and

Hon'ble MR.JUSTICE Y.B.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

KHANBHA DIPSINH

Appearance:

MR KC SHAH PUBLIC PROSECUTOR for appellant

MR JV DESAI for Respondent No. 1

CORAM : MR.JUSTICE S.D.DAVE and

MR.JUSTICE Y.B.BHATT

Date of decision: 18/07/97

ORAL JUDGEMENT

1. In all 16 accused persons came to be acquitted of

the offences punishable under section 147, 148, 149, 307, 326, 324, 323 IPC and under section 25(1)(a) of the Arms Act, by the learned Sessions Judge, Surendranagar in Sessions Case No.34 of 1984, under his orders dated September 29, 1984. The State had presented the appeal against the orders of acquittal qua all the original accused persons numbering 16. Anyhow, at the stage of the admission the appeal came to be admitted against the respondent-accused nos.1, 2, 6, 14 and 15. In this appeal, therefore, we are concerned with the question as to whether the learned Sessions Judge, Surendranagar was justified in recording the orders of acquittal qua the abovesaid respondents.

2. The court below was impressed because of the multiple infirmities demonstrated by the case of the prosecution. It was the impression created on the judicial conscience, and in our opinion rightly, that Kanthubha, the injured had made a lot of improvement in his say during the course of the trial. The Court below was also not prepared to place reliance upon the evidence of the complainant and other witnesses. With a view to examine this finding of the learned Trial Judge, a notice to some relevant facts, in our opinion, would be necessary.

3. The case of the prosecution was that the accused persons having formed themselves into an unlawful assembly and having armed with deadly weapons like dharias, sticks and guns, had committed rioting at village Zinzuwada under the Dasada taluka of the Surendranagar district at about 2.30 p.m. on September 29, 1983, and during the rioting had injured prosecution witness Kanthubha and complainant Hirubha, and that the injuries caused were of such a nature that if the said two persons were to die because of the injuries, the offence would be one punishable under section 302 IPC. It is on this basis that the charge against the 16 accused persons was framed at Exh.3 for the alleged commission of the offences punishable under section 147, 148, 149 read with section 307 IPC and also under section 324 and 323 read with section 149 IPC. The accused persons nos.15 and 16 were charged with the offence punishable under section 25(1)(a) of the Arms Act on the accusation that they were having the guns without having obtained the appropriate licence from the appropriate authority.

4. The court below has read the evidence of Kanthubha in detail and has come to the conclusion that he had made a lot of improvement in his say regarding the

way and the manner in which the incident had occurred and also in respect of the part played by the accused while committing the abovesaid offences. Upon a scrutiny of the evidence as a whole we are satisfied that the learned Trial Judge was perfectly justified in his conclusion in this respect.

5. Before the evidence of Kanthubha, PW4 (Exh.29) and of Dhirubha, PW1 (Exh.21) can be referred, it would be appropriate to have a look at the evidence tendered by the Police Head Constable Yonathan, PW10 (Exh.48), who at the relevant time was present at Zinzuwada police station and was the Incharge Police Station Officer. He has said that at the relevant time he was at the police station and had heard that there was a riot between two groups of the Darbars in the village. So far as the incident itself is concerned he has made it clear that Kanthubha, the injured was found to be lying near the gate of the police station and that he had no idea as to who were the persons who had brought him there. His say further is that he had not seen and in the same way had not identified the people who had brought Kanthubha in the injured condition near the police station. Anyhow, his say is that he had seen a group of about 100 to 200 people near the police station. Therefore, the say of the Head Constable Yonathan is that the injured was found to be lying near the gate of the police station and nobody had come forward to register any information with the police officer who was Incharge of that police station. Precisely the same is the say in the Entry in the police station diary which came to be made by Head Constable Yonathan and which was available at Exh.49 before the learned Trial Judge. This entry made by the PSO in the station diary only says that it has been brought to the notice of the police that there was a riot between two sections or groups of the people belonging to Darbar community in the village and that necessary police protection should be given. It is also stated in the police station diary entry that one Kanthubha had received grave injuries and that therefore he has been referred to Viramgam Hospital. Therefore the testimony of Head Constable Yonathan and the police station diary Exh.49 would go to show that the injured Kanthubha was found to be lying near the police station and nobody had given any information regarding the incident to PSO Yonathan.

6. Kanthubha, PW4 (Exh.29) has tried to implicate all the accused persons during his oral testimony. But it appears that he was found to be saying a lot many things which would run counter to his say in the

statements which came to be recorded at Ahmedabad. The court below has said that Exh.46 the statement of Kanthubha which came to be recorded by the Executive Magistrate, Ahmedabad, would be admissible in the evidence as the dying declaration. There is no need of telling that this view adopted by the court below does not appear to be a justifiable one. A statement would become admissible in evidence under section 32(1) of the Evidence Act only if the injured does not survive the injuries which he receives. The phraseology employed in the section is abundantly clear which makes it eloquent that the statement made by a person regarding the cause of his death or regarding the circumstances relating to the transaction which resulted in his death would be admissible in evidence provided he is dead. Naturally, therefore, the statement recorded by the Executive Magistrate Mr. Modi, PW8 (Exh.44) could not have been admitted in evidence in the form of dying declaration. Nonetheless, it remained, as a statement on the record and the defence has utilised the same for the purpose of bringing on record, various contradictions.

7. Kanthubha was required to admit that many things which he was testifying before the court below were never said in his statement before the learned Executive Magistrate. He had gone to the extent of saying that he does not know as to whether he had given the names of other accused persons excepting the accused nos.1,2, 6, 14 and 15 at any relevant time. He has also admitted that his version before the police, at one juncture was that one Hasubha who has got a galla just opposite the police station had taken him to the police station. It is needless to emphasize that this is not the say of Head Constable Yonathan PW10 (Exh.48). Moreover, this Hasubha never came to be examined.

8. Dhirubha, PW1 (Exh.21) happens to be the complainant who had lodged the FIR at a belated stage. His say is that he was present in the company of injured Kanthubha and that after the incident was over, he was one of the persons who had removed Kanthubha to the police station. His say is that later on within the knowledge of the police station officer injured Kanthubha was taken to the hospital at Zinzuwada, but as the medical officer incharge was found not to be present, Kanthubha was taken to Viramgam. This say of the Dhirubha runs counter to the say of the PSO Yonathan to whose evidence we have made a reference earlier. Moreover, Kanthubha was made to admit during the cross-examination that it was never his say that Dhirubha was in his company. It appears that Kanthubha during his

statement was saying that only one man viz. Motibhai PW3 (Exh.28) was in his company when the incident had occurred. This say of the Kanthubha would go to show that even the presence of Dhirubha, the complainant at the place of occurrence or in the company of the injured Kanthubha cannot be accepted.

9. When the evidence of Motibhai, PW3 (Exh.28) is referred, it becomes clear that during the examination in cheif he had said something regarding the accused no.1 and 2 alone. This is so because he had made it clear that there was a crowd of the people belonging to the Darbar community, but he could identify accused nos.1 and 2 only. In other words, he was not able to identify any of the other accused persons including the respondent-accused nos.6, 14 and 15 with whom we are concerned in the present appeal. Even so far as the respondent accused nos.1 and 2 are concerned, the say of Motibhai is that he had not said even in his belated statement before the police, that the accused nos.1 and 2 were the members of the unlawful assembly and that they were having the weapons like dharia with which allegedly they had assaulted upon Kanthubha.

10. Thus, the evidence of Kanthubha, PW4, the complainant Dhirubha, PW1 and witness Motibhai, PW3 has rightly not inspired any confidence in the judicial conscience of the court below. In our opinion, the Sessions Judge was perfectly justified in not placing any reliance upon this type of evidence with a view to come to the conclusion that the prosecution was successful in establishing any of the charges levelled against any of the accused persons.

11. In our opinion, therefore the present appeal against acquittal requires to be dismissed. We order accordingly. The bail bonds of respondent nos.1, 2, 6, 14 and 15 shall stand cancelled.
